IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 305

UNITED STATES OF AMERICA,

Appellant,

—v.—

JOHN HEFFRON SISSON, JR.,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

BRIEF OF AMERICAN HUMANIST ASSOCIATION AND AMERICAN CIVIL LIBERTIES UNION, *AMICI CURIAE*

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Interest of *Amici*.*

Interest of American Humanist Association

The American Humanist Association is an organization of individuals who believe that for man to realize his potential he must apply reason and the principles of science to the solution of his personal and social problems. Humanists believe that mankind has only itself to rely upon and only this life with which to be concerned. Therefore, humanists would agree with Albert Camus that:

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* Written consents by the attorneys for both parties have been filed with the Clerk.

> If there is a sin against life, it consists perhaps, not so much in despairing of life as in hoping for another life and in eluding the implacable grandeur of this life. *The Myth of Sisyphus.*

This interest in improving our present life has led humanists to be concerned about world peace. Many humanists, though by no means all, have reached the conclusion that any war and the participation in any armed conflict is morally unjustifiable. Others have concluded that only wars of aggression must be opposed. In addition, all humanists believe that conscientious objection should be afforded to those not formally religious as well as to those who are. The American Humanist Association believes that all are equally entitled to exemption and therefore requests permission to file this brief as Amicus Curiae in support of the appellee.

Interest of American Civil Liberties Union

For a half-century the American Civil Liberties Union has defended the rights protected by the Bill of Rights. In particular, it has represented those who have asserted the rights of conscience and religious liberty protected by the First Amendment against government infringement. Indeed, the ACLU was founded in the crucible of the First World War to defend the rights of conscientious objectors to that war.

In accord with our commitment to the protection of conscience, the ACLU has taken the position that those whose conscience compels them to oppose a particular war are entitled to the same exemption from training and

service in the armed forces as is granted to the universal pacifist under the Military Selective Service Act of 1967. We file this brief in order to present to the Court our arguments of law which support that position.

Questions Presented

1. Can a young man be forced to kill against the dictates of his conscience in a foreign military campaign which he finds immoral, at least where that campaign is not pursuant to a declaration of the war or in defense of the homeland?

2. May Congress grant an exemption from military service only to those whose objection to participation in war derives from sources which are "religious" in an orthodox or conventional sense, and not to those whose objection derives from less conventionally religious sources which are equally binding and conscientious?

Statutes Involved

Section 12(a) of the Military Selective Service Act of 1967 (50 U.S.C. App. (Supp. IV) 462(a)) provides, in pertinent part:

> Any * * * person * * * who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under * * * this title * * *, shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both * * *.

Section 6(j) of the Military Selective Service Act of 1967 (50 U.S.C. App. (Supp. IV) 456 (j)) provides, in pertinent part:

> Nothing contained in this title * * * shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. As used in this subsection, the term "religious training and belief" does not include essentially political, sociological, or philosophical views, or a merely personal moral code. * * *

Statement

On March 18, 1968, Local Board No. 114 Middlesex County, Massachusetts, ordered John H. Sisson, Jr., to report for induction. On April 17, 1968, Sisson reported for induction but refused to take the symbolic step forward. On March 21, 1969, a jury found him guilty of violating §462 of the Military Selective Service Act of 1967. Pursuant to Rule 34 of the Federal Rules of Criminal Procedure, Sisson on March 28, 1969, filed an amended motion in arrest of judgment, which was granted with opinion dated April 1, 1969.

Sisson graduated in 1963 from the Phillips Exeter Academy and in 1967 from Harvard College. He enlisted in the Peace Corps in July 1967, but after training he was, for reasons that have no moral connotations and no relevance to this case, "deselected" in September 1967. In January 1968 he went to work as a reporter for *The Southern Courier*, published in Montgomery, Alabama. That paper

assigned him to work in Mississippi, where he was when he received the induction order.

The first formal indication in the record that Sisson had conscientious scruples is a letter of February 29, 1968 in which he notified his Board that "I find myself to be conscientiously opposed to service in the Armed Forces. Would you please send me SSS Form No. 150 so that I might make my claim as a conscientious objector." On receiving the form, Sisson concluded that since his objection was not religious within the administrative and statutory definitions incorporated in that form, he was not entitled to have the benefit of the exemption described in it. He, therefore, did not complete and return the form.

Although the record showed no earlier formal indication of conscientious objection, Sisson's attitude as a non-religious conscientious objector has had a long history. Sisson himself referred to his moral development, his educational training, his extensive reading of reports about and comments on the Vietnam situation, and the degree to which he had familiarized himself with the U.N. Charter, the charter and judgments of the Nuremberg Tribunal, and other domestic and international matters bearing upon the American involvement in Vietnam.

The court below found that Sisson was sincere and that "[t]here is not the slightest basis for impugning Sisson's courage"; further, that he was not motivated by purely "political" considerations, but that "his table of ultimate values is moral and ethical . . . reflect[ing] quite as real, pervasive, durable, and commendable a marshalling of priorities as a formal religion. . . . What another derives from the discipline of a church, Sisson derives from discipline of

conscience. . . . He was as genuinely and profoundly governed by his conscience as would have been a martyr obedient to an orthodox religion." The Court concluded that his views were "not only sincere, but, without necessarily being right, are reasonable."[1]

Summary of Argument

1. Sisson is entitled to exemption as a conscientious objector under the First, Fifth and Ninth Amendments even though his objection is selective and its sources not formally religious.

a. There is a right of conscience "whose principles are either religious or akin thereto," App. 23, implicit in the entire Bill of Rights, and explicit in the First Amendment to the Constitution. Invoking such right, Sisson is entitled to exemption from combat duty in a foreign undeclared war where there is no suggestion of a national need for his services.

b. The fact that Sisson's objection is limited to wars that he conscientiously and sincerely considers immoral cannot disqualify him from such an exemption without violating the free exercise of religion and establishment clauses. To grant the exemption only to universal religious pacifists discriminates invidiously against selective religious pacifists, and to favor any religious objectors over non-religious pacifists, selective or universal, discriminates in favor of such religious believers and against non-believers.

c. Permitting exemption for selective objectors is consistent with the statute.

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[1] Appendix to Jurisdictional Statement 20-22. Citations to the opinion below will be to the Appendix to the Government's Jurisdictional Statement, and will be cited as "App. ——."

d. Such discrimination has not been justified by jeopardly to national interests of significant magnitude, for no showing thereof has been made or even attempted.

e. Allowing an exemption because of the lack of overriding need when all the relevant facts are undisputed, does not implicate courts in "political questions" since such issues have often been considered by courts, nor does it harm the integrity of the democratic process, morale or efficiency.

2. It is an unconstitutional favoring of religion to grant exemption to religious conscientious objectors and not to those not formally religious in the statutory sense.

ARGUMENT

I.

ONE WHO SINCERELY AND CONSCIENTIOUSLY OPPOSES A PARTICULAR WAR AS IMMORAL MAY NOT BE FORCED TO KILL, AT LEAST WHERE THAT WAR HAS NOT BEEN THE SUBJECT OF A CONGRESSIONAL DECLARATION OF WAR, AND DOES NOT ENDANGER THE HOMELAND.

A. Introduction: The Narrow Holding of the Court Below

The problems properly raised by this case are as difficult and complex as any which have recently come before this Court. They are not, however, as far-reaching as the Government's Brief would make them.[2]

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[2] In addition to its substantive arguments against recognition of selective conscientious objection, the Government urges that this Court should not even reach this question because Sisson's induc-

Put precisely, the district court held that under the First Amendment and the due process clauses, one who is sincerely opposed to a particular foreign military campaign as immoral cannot be forced into combat duty where he may be required to kill or be killed, where that campaign has not been authorized or ratified by a congressional

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tion "would not immediately occasion his being sent to Vietnam, and would not necessarily result in his ever being sent there." Brief, p. 37. It is the essence of the decision below that the magnitude of Sisson's conscientious objection required a holding that he "cannot constitutionally be subjected to military orders (*not reviewable in a United States constitutional court*) which may require him to kill in the Vietnam conflict." App. 36 (Emphasis added). The court below obviously had good reason to be concerned about the availability of a constitutional court to a man in the military service who conscientiously objects to participation in an unjust war. The Government has consistently opposed Federal Court jurisdiction of such claims by servicemen, usually with the contention that Federal Courts should refrain from interfering with military duty assignments and travel orders. See *Noyd* v. *McNamara*, 267 F.Supp. 701 (D. Colo. 1967), *aff'd* 378 F.2d 538 (10th Cir. 1967), *cert. denied*, 389 U.S. 1022 (1967); *Luftig* v. *McNamara*, 373 F.2d 664 (D.C. Cir.), *cert. denied*, 387 U.S. 945 (1967); *Mora* v. *McNamara*, 387 F.2d 862 (D.C. Cir.), *cert. denied*, 389 U.S. 934 (1967); see also *Orloff* v. *Willoughby*, 345 U.S. 83 (1953). For an illustration of judicial cognition of the inability to find a Federal forum to hear and decide anything but the jurisdictional question, see *United States* v. *Owens*, 415 F.2d 1308, 1316 (6th Cir. 1969), certiorari pending. That a selective conscientious objector—or indeed, any conscientious objector—cannot expect to find a hospitable forum within the military judiciary is sadly borne out by the series of frustrations experienced by Air Force Captain Dale Noyd. See *United States* v. *Noyd*, 18 USCMA 483; 40 CMR 195 (1969), affirming *United States* v. *Noyd*, ACM 20121, 39 CMR —— (1968). See also *Mueller* v. *Brown*, 18 USCMA 534, 40 CMR 246 (1969); *Jones* v. *Lemond*, 18 USCMA 513, 40 CMR 225 (1969); *Lee* v. *Pearson*, 18 USCMA 545, 40 CMR 257 (1969). In sum, what Judge Wyzanski held is that a just war objector had a right to have his case considered by a constitutional court rather than a military tribunal in the context of a court martial, and that unless Sisson received his hearing in Judge Wyzanski's court there would be no assurance that he could receive it in any other constitutional court.

declaration of war, and where it is not made necessary in defense of an invasion or other immediate danger to the nation, and even though the source of the objection is not formally religious. The court did not, either directly or by implication, pass on the rightness of the Vietnam war, the availability of the so-called Nuremberg defense, the Government's powers of conscription, or any one of a host of other issues. More specifically, it did *not* rule that—

(1) A selective conscientious objector—or indeed, *any* conscientious objector—could be exempt, in peace or war, from any military service other than combat duty;[3]

(2) Civil disobedience of any kind was either legally or morally permissible (Gov't Brief 40, 48-49).

(3) The United States had no need in Vietnam for combat troops in general (Gov't Brief 41-42, 48-49).

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[3] The court below *assumed* "that a conscientious objector, religious or otherwise, may be conscripted for *some* kinds of service in peace or war," App. 27 (emphasis added), and limited its holding to a compulsory *combat* assignment in violation of conscience. Amici respectfully urge, however, that the logic of Judge Wyzanski's reasoning, as well as the constitutional imperatives discussed in this Brief, cannot allow any invidious distinction between compulsory combat service in violation of conscience and compulsory non-combatant military service in violation of conscience. Section 6(j) of the Military Selective Service Act of 1967, and all of its precursors in the statutory history of conscientious objection, have always recognized both categories of conscientious objection. The conscience of the man who can wear the uniform but cannot bear a weapon has never been thought to be more worthy of protection than the conscience of the man who cannot participate in military service in any capacity. Since both are recognized by statute, it would not be constitutionally permissible to include selective objectors of one category, but to exclude selective objectors of the other category. See *Sherbert* v. *Verner*, 374 U.S. 398 (1963) and *Torcaso* v. *Watkins*, 367 U.S. 488 (1961). It must be conceded, however, that it is not necessary for this Court to adopt this argument in its full logical extension in order to affirm the judgment below.

Within this narrow compass, there are nevertheless two crucial issues:

(1) whether selective objection in these circumstances is constitutionally protected—and, as will be argued below, also statutorily authorized—and;

(2) whether a distinction betwen statutorily defined religious and non-religious objectors is unconstitutional.

B. The First, Fifth, and Ninth[4] Amendments Create a Right to Conscientiously Refuse to Kill Which Is Not Forfeited by the Selective Nature of the Objection

1. *Sources of the right of conscientious objection*

"Two things fill me with awe," wrote Immanuel Kant, "the starry heavens above and the moral law within." It is this "moral law within" which impelled John Sisson to refuse to be subjected to combat duty, to kill in a war he considered immoral. "[B]oth morals and sound policy require that the state should not violate the conscience of the individual," wrote Harlan Fiske Stone, in *The Conscientious Objector,* 21 Colum. U.Q. 253, 269 (1919), quoted in *United States* v. *Seeger,* 380 U.S. 163, 170 (1965), for as Judge Wyzanski stated below:

> When the state through its laws seeks to override reasonable moral commitments it makes a dangerously uncharacteristic choice. . . . When the law treats a reasonable, conscientious act as a crime it subverts its own power. It invites civil disobedience. It impairs the very habits which nourish and preserve the law. App. 33.

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[4] The Ninth Amendment support is elaborated in Appellee's Brief, pp. 97-102 and will not be specifically discussed here.

This right to obey the moral law is reflected in the First Amendment guarantee of religious liberty and is, indeed, implicit in our entire constitutional framework and origins. Although the "free exercise of religion" clause obviously refers explicitly only to religion,[5] it was obedience to conscience and morality that made this nation a haven for freedom-loving men everywhere. The history of our national origins is largely a history of religious dissenters and conscientious objectors like the Puritans, the Quakers, Roger Williams, the 1848 immigrants, and others. See Sibley, "Dissent: The Tradition and Its Implications," in Finn (ed.), *A Conflict of Loyalties*, 103-139 (1968). Numerous provisions of the Constitution are directly and indirectly designed to protect the dissenting conscience in various aspects of civic life. This is certainly true of the freedom of speech and press clauses, but it is equally true of the privilege against self-incrimination in the Fifth Amendment, as used for example by John Lilburn and others, see Griswold, *The Fifth Amendment Today*, 3-4, 8-9 (1955), the protection against unreasonable searches and seizures of the Fourth, see *Marcus* v. *Search Warrants*, 367 U.S. 717, 724-29 (1961). In short, by the same reasoning which supported the development of a right of privacy in *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), it is not merely possible but appropriate to recognize a right of conscience against governmental compulsion to perform certain acts.

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[5] Because of the almost universally religious source of conscience in the 18th century, the moral conscience was virtually identical with religious conscience, and thus, protection for the latter virtually guaranteed full protection for the former. See generally Brodie and Sutherland, *Conscience, the Constitution and the Supreme Court: The Riddle of United States* v. *Seeger*, 1966 Wis. L.Rev. 306, 309.

The fact that the objection in question relates to a particular war does not make it any the less conscientious. As Judge Wyzanski noted, "a selective conscientious objector might reflect a more discriminating study of the problem, a more sensitive conscience and a deeper spiritual understanding." App. 29. Indeed, by far the greater number and larger bodies of all religions recognize the right of conscientious abstention from some wars but not others.[6] The Catholic doctrine of the just war is well known, and is deeply rooted in St. Augustine and St. Thomas Aquinas. See *United States* v. *Bowen*, —— F. Supp. —— (N.D. Calif. Dec. 24, 1969), 38 U.S.L. Week 2361, n. 1. Various Protestant groups have asserted the right of selective opposition to unjust wars, see, e.g., Fourth Assembly of the World Council of Churches, N. Y. Times, July 17, 1968, at p. 1, col. 3; A Policy Statement of the National Council of Churches of Christ in the United States of America (Feb. 23, 1967). Jehovah's Witnesses believe in theocratic wars and in self-defense of their brethren and their Church, see, e.g., *Sicurella* v. *United States*, 348 U.S. 385 (1955); *Kretchet* v. *United States*, 284 F.2d 561 (9th Cir. 1960). Even Quaker doctrine seems to approve the use of force to maintain world peace, as can be seen from William Penn's charter for world government. See Sibley & Jacob, *Conscription of Conscience: 1940-47* 25 (1952). See also

[6] In *Noyd* v. *McNamara*, 267 F. Supp. 701 (D. Colo. 1967), *aff'd* 378 F.2d 538 (10th Cir.), *cert. denied* 389 U.S. 1022 (1967), the District Court allowed petitioner, a regular Air Force officer who had become a selective conscientious objector after eleven years of honorable service, to present extensive expert testimony by "distinguished theologians and philosophers," 267 F. Supp. at 705, on the history and religious significance of selective objection. Since such testimony is of relevance to the issues before this Court in this case, amici are reprinting, as an appendix to this brief, the digest of the expert theological testimony which was included on pp. 12-15 of the petition for certiorari in *Noyd* v. *McNamara*.

Gendler, "War and the Jewish Tradition," in Finn (ed.), *A Conflict of Loyalties*, 78-102 (1968). The fact is that almost every pacifist believes in the use of force for self-defense and police purposes at least.

As Chief Justice Hughes said in *United States* v. *MacIntosh*, 283 U.S. 605, 627 (1931) (dissent):

> "There is nothing new in such an attitude. Among the most eminent statesmen here and abroad have been those who condemned the action of their country in entering into wars they thought to be unjustified. Agreements for the renunciation of war presuppose a preponderant public sentiment against wars of aggression." 283 U.S. at 635.

2. *It is unconstitutionally discriminatory to deny the exemption to selective objectors when granting exemption to total objectors*

It is clearly discriminatory under *Sherbert* v. *Verner*, 374 U.S. 398 (1963) to grant a benefit to adherents of one religious belief while denying it to those of other beliefs, even where the impact is only indirect. "[I]f the purpose or effect of a law . . . is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect," 374 U.S. at 404, quoting *Braunfeld* v. *Brown*, 366 U.S. 599 (1961). If benefits are denied only to those whose religious practices and beliefs preclude them from being eligible therefor, an enormous burden falls on the proponents of such legislation to show "the gravest abuses, endangering paramount interests." 374 U.S. at 406-07.

Applying this to Sisson, it seems clear that if the state exempts from combat service those who refuse to fight in

a war because their religious belief induces them to oppose *all* wars, while denying it to those whose religious beliefs induce them to refuse to fight in that same war but because they religiously oppose only *some* wars, the state's action is "constitutionally invalid." It forces the latter to forego the exercise of his most profound religious beliefs (certainly as religious belief has been defined in *Seeger*), that it is perhaps moral and ethical to fight in a just war, but in no case in an unjust one.[7] To condition the exemption on the profession of a religious belief requiring total pacifism violates both the free exercise and establishment clauses of the First Amendment.

The burden of justifying such an encroachment is very heavy, indeed. *Sherbert* v. *Verner*, 374 U.S. at 406-07, MacGill, *Selective Conscientious Objection: Divine Will and Legislative Grace*, 54 Va. L.Rev. 1355, 1377-83 (1968). As is demonstrated below in Part IC, this burden has not been met. See also MacGill, 54 Va. L.Rev. at 1378-83.

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[7] Here one sees one of the most paradoxical aspects involved in denying exemption to the selective conscientious objector: the denial is based on the selective conscientious objector's expectation that he would indeed fight in a *hypothetical* moral war, but he abstains from the very same *actual* war that the total pacifist opposes. Indeed, it is unlikely that the selective conscientious objector will ever really have to participate in the hypothetically just war he has admitted willingness to fight in. It is his honesty with respect to a situation that he may well never face, that disqualifies him from the exemption for total pacifists. *Cf.* Segal, "Conscientious Objection and Moral Agency," in Finn (ed.), *A Conflict of Loyalties*, 263-283 (1968) ("We cannot know for sure that a time will not come when there will be a war which should be fought in order to prevent the destruction of all life," *id.* at 283). Appended to the essay of Mr. Segal is his own application for classification as a selective conscientious objector. *Id.* at 283-287.

This case of course involves more than a distinction among religious objectors, for Sisson is not "formally religious" in the statutory sense. But if it is impermissible to discriminate among religions by favoring a religious belief requiring total pacifism over a religious belief entailing selective objection, and if, as will be argued below and as was concluded by Judge Wyzanski, it is similarly illegitimate to favor religious believers over those with non-religious beliefs, then it is constitutionally irrelevant that the claim in this case is based on formally non-religious sources. *Torcaso* v. *Watkins*, 367 U.S. 488 (1961).

In sum, if a total religious pacifist is granted an exemption, a selective religious pacifist must also be; and if a religious pacifist, total or selective, is entitled to an exemption, then a non-religious pacifist must also be. Once any exemption is granted for religious reasons, one cannot distinguish among different kinds of religious pacifisms (total or selective) or between any religious pacifism and a non-religious kind. There can be no discrimination in favor of either one religious conscience over another, or in favor of the religious conscience in general over the non-religious conscience.

3. *Balancing rights against needs*

As Judge Wyzanski noted, however, no such right of conscience is absolute, and a balancing process is necessary to determine the scope and limits of the right of conscientious objection. Compare, *Barenblatt* v. *United States*, 360 U.S. 109 (1959). It is here that the link with the due process clause also appears, for the issue is whether there is a rational basis or need for the infringement of the right, with a heavy weight in favor of the

right because of its First Amendment sources. Compare, *Sherbert* v. *Werner*, 374 U.S. at 406-07 ("the gravest abuses, endangering paramount interests").

Focusing on the narrowness of Sisson's claim, and on the absence of any countervailing claim of need, Judge Wyzanski concluded that no case had been made requiring Sisson to kill, contrary to the dictates of his conscience, in a foreign military campaign fought "for limited objects with no likelihood of a battlefront within this country and without a declaration of war . . ." App. 29. The court stressed the absence of "any suggestion that in present circumstances there is a national need for combat service from Sisson as distinguished from other forms of service by him." *Ibid.* The district court thus found that no case for national need had been made to override the claim of conscience, doing the same kind of "balancing by the courts of the competing private and public interests at stake in the particular circumstances shown," as this Court has done in other First Amendment contexts. See *Barenblatt*, 360 U.S. at 126. The court's judgment was based on no disputed issues of fact, and the Government has not challenged the merits of this finding but only whether any court may even consider such a claim. See Point IC1 of this brief below.

4. *Section 6(j) is consistent with selective conscientious objection*

Although the Government seems to deny any statutory support for a claim of selective conscientious objection both the statute and decisional law suggest the opposite.

> Nothing contained in this title . . . shall be construed to require any person to be subject to combatant train-

> ing and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. As used in this subsection, the term "religious training and belief" does not include essentially political, sociological, or philosophical views, or a merely personal moral code. • • •

On its face, it is difficult to see why "in any form" necessarily modifies "war" and not "participation." If it modified "participation," it would quite signfiicantly exempt from combat someone who refuses to serve in the military in any capacity, thus leaving open the possibility of compulsory non-military service. Indeed, if the phrase "in any form" is intended to exclude selective objection, it is a quite inartful expression, for surely "all wars" or "any war" would more clearly express that conception.

Equally important, a number of cases have allowed the claim of selective opposition to war.

In *Sicurella* v. *United States*, 348 U.S. 385 (1955) this Court held that a Jehovah's Witness, who believed in the use of force to defend his "ministry, Kingdom Interests and • • • his fellow brethren," 348 U.S. at 388, though not himself, and would fight in a war at God's request, though apparently only with spiritual weapons, was entitled to conscientious objector status. Two Justices dissented, claiming that the defendant was being allowed to choose the wars he would fight in. In accord with this decision, the lower federal courts have granted Jehovah's Witnesses such exemptions in a long series of cases, even where the Witness was willing to slay men at Jehovah's request. See, *Kretchet* v. *United States*, 284 F.2d 561 (9th Cir. 1961);

Shepherd v. *United States*, 217 F.2d 942 (9th Cir. 1954); *Bouziden* v. *United States*, 251 F.2d 728 (10th Cir.), *cert. denied*, 356 U.S. 927 (1958); *Mayfield* v. *United States*, 220 F.2d 729 (5th Cir. 1955); *United States* v. *Pekarski*, 207 F.2d 930 (2nd Cir. 1953). Although the Court in *Sicurella* stressed that such orders had not yet come from Jehovah and were unlikely to, all these defendants appeared willing to use force in defense of their Church or their brethren, but not aggressively, just as petitioner expressed willingness to use force in defense of his country but not aggressively.

In addition, the decision in *Fleming* v. *United States*, 344 F.2d 912 (10th Cir. 1965), seems to have granted an exemption to one who believed that some wars are permitted. Though he thought "love and positive forces" would usually be effective to eliminated war, he added that "force should be used only as a final alternative and under fair circumstances." 344 F.2d at 914. Expressly adverting to defense of country, the defendant in *Fleming* stated that "self-defense of a people would not involve war—but protection against a smaller group which could not be reconciled by intelligence and positive forces." *Ibid.*

More explicitly and directly relevant hereto, the recent decision in *United States* v. *Bowen*, —— F. Supp. ——, Cr. No. 42499 (N.D. Calif., Dec. 24, 1969), 38 U.S. L. Week 2361, acquitted a selective conscientious objector, holding that discrimination against selective objectors was a violation of the Equal Protection Clause. Judge Weigel held: "... it is clear that there is no compelling governmental interest for distinguishing the defendant, who is opposed to participation in the Vietnam War on religious grounds, from others who are religiously opposed to all wars." 38 U.S. L. Week at 2362. See also *Noyd* v. *McNamara*, 296 F.

Supp. 136, 137 (D. Colo. Mar. 29, 1967) (granting preliminary injunction against assignment of Air Force officer to any duties which would be in violation of his selective conscientious objection) where Judge Doyle cited *United States* v. *Seeger, supra,* and *Sicurella* v. *United States, supra,* and held:

> "Although it doesn't deal specifically with whether one can be a conscientious objector in a limited way, it does indicate that there are no particular limitations upon holding these conscientious views in terms of the nature or character of the religion or the philosophy which moves him to adopt such views" 296 F. Supp. at 137.[8]

On the other hand, some cases have held or seemed to hold that the phrase "participation in war in any form" precludes an exemption for selective objectors. The decision most often cited for this proposition is *United States* v. *Kauten,* 133 F.2d 703 (2d Cir. 1943). In it Judge Augustus N. Hand said that an exemptible conscientious objection "must ex vi termini be a general scruple against 'participation in war in any form' and not merely an objection to participation in this particular war[,]" 133 F.2d at 707. But the significant fact about *Kauten* is that the defendant there was an objector to *all* wars; the defect in his application for exemption was held to be that his objection was not religious. The foregoing dictum reflected only a suggestion—also not necessary to the decision—that the non-

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[8] The District Court subsequently dismissed the complaint for lack of jurisdiction, 267 F. Supp. 701 (D. Colo. 1967), reiterating that "We do not reach the merits of plaintiff's case and hence we do not deny his sincerity or reject his particular basis for claiming that he is a conscientious objector," *id.* at 708; *aff'd* 378 F.2d 538 (10th Cir. 1967); *cert. denied* 389 U.S. 1022 (1967).

universal pacifist will be less likely to be a religious one. That suggestion seems doubtful in the light of the analysis by theologians now available (see pp. 29, 32-33, *infra*, and Appendix). While the *Kauten* holding—that a non-religious total pacifist cannot qualify—may have been good law in 1943 it can scarcely be accepted as such today. See Part II, below. In all events, the comment on exempting objectors to "this particular war," since the question was not before that court, scarcely merits the weight as authority which *Kauten's* numerous citations have appeared to give it. *Cf. United States ex rel. Phillips* v. *Downer*, 135 F.2d 521, 524 (2d Cir. 1943).

United States v. *Kurki*, 255 F. Supp. 161 (E.D. Wisc. 1966) *aff'd on other grounds*, 384 F.2d 905 (7th Cir. 1967), *cert. denied*, 390 U.S. 926 (1968) held that the words, "in any form," modify "war," precluding exemption of selective objectors. This lone holding was decided on a hurriedly submitted motion, made after the defendant had changed attorneys and the theory of his defense. See 255 F. Supp. at 163.

The contrary position however was taken by the Eighth, Seventh, and Second Circuits. See *Taffs* v. *United States*, 208 F.2d 329, 331 (8th Cir. 1953), *cert. denied*, 347 U.S. 928 (1954); *United States* v. *Hartman*, 209 F.2d 366, 371 (2d Cir. 1954); *United States* v. *Close*, 215 F.2d 439, 442 (7th Cir. 1954), *cert. denied*, 348 U.S. 970 (1955).

Thus, in *Taffs*, the Court declared that

> "The words, 'in any form', obviously relate, not to 'war' but to 'participation in' war. War, generally speaking, has only one form, a clash of opposing forces. But a person's participation therein may be in a variety of forms. He may be carrying a rifle, piloting a plane,

> working in a clerical staff behind the lines, or working in a defense plant on the home front. We thing Congress intended by this section to exempt those persons from serving in the armed forces whose religious beliefs were opposed to any form of participation in a flesh and blood war between nations." 208 F.2d at 331.

Regardless of whether this case involved Jehovah's Witnesses and theocratic wars, the Court's interpretation of the modifying clause is appropriate to all cases.

Seeger's citation to the *Macintosh* dissent lends some further support to this reading. The *Seeger* case first cited that dissent as "enunciat[ing] the long recognition of conscientious objection," and quoted Chief Justice Hughes' eloquent defense of the right of conscience, a *defense made on behalf of a selective objector*. Moreover, other key quotations and citations in *Seeger*, see 380 U.S. at 170, are in the same paragraph as that in which Chief Justice Hughes declared that "Professor Macintosh, when pressed by the inquiries put to him, stated what is axiomatic in religious doctrine." 283 U.S. at 634. These statements by Professor Macintosh were manifestly a profession of selective opposition. See 283 U.S. at 617-19. Surely the adoption of the rationale of the *Macintosh* dissent by both the *Seeger* court and by Congress, see 380 U.S. at 170, impliedly adopted its application to the very situation in which that rationale was first enunciated—selective opposition based on conscience.

Indeed, this recognition of selective objection is in harmony with the legislative intent. The legislative purpose in enacting the exemption of conscientious objectors was twofold: the preservation of religious liberty and the pre-

vention of disruption within the armed forces. An interpretation of the statute to encompass Sisson's beliefs is consistent with both of these purposes; neither goal is advanced by distinguishing between the two forms of conscientious objection.

(1) Preservation of religious liberty

The primary reason for the exemption is acknowledged to be the protection of individual conscience. Congress was giving expression to this country's deep-rooted concern for religious liberty. In particular, this recognition of the claims of conscience and protection of the rights of conscientious objectors traces itself back to the origins of our history in colonial times. Selective Service System, 1 *Conscientious Objection* (Special Monograph No. 11, 1950). As this Court recognized in *Seeger*, the fundamental objective of Congress in exempting conscientious objectors from military service has been to avoid government compulsion of actions contrary to religious beliefs, either by induction into the service contrary to conscience or by imprisonment for refusal to serve:

> "Chief Justice Hughes, in his opinion in *United States* v. *Macintosh*, 283 U.S. 605 (1931), enunciated the rationale behind the long recognition of conscientious objection to participation in war accorded by Congress in our various conscription laws when he declared that 'in the forum of conscience, duty to a moral power higher than the State has always been maintained.' At 633 (dissenting opinion). In a similar vein Harlan Fiske Stone, later Chief Justice, drew from the Nation's past when he declared that 'both morals and

sound policy require that the state should not violate the conscience of the individual. . . .'" *United States* v. *Seeger*, 380 U.S. 163, 169-170 (1965)

This purpose was emphasized throughout the congressional hearings before the House Military Affairs Committee on the Selective Training and Service Bill between July 10 and August 2, 1940:

"Mr. Sparkman: You are not asking recognition for just your group, but you are asking us to recognize that there is such a thing as an individual conscience?

"Mr. Horst: Yes, sir.

"Mr. Sparkman: And the individual conscience is to be respected so long as it is sincere?

"Mr. Horst: That is the way we feel about it.

"Mr. Sparkman: And that is the traditional thing in our history, is it not, and our country's handling of affairs in the past?

"Mr. Horst: I think so. . . ." National Service Board of Religious Objectors, *Congress Looks at the Conscientious Objector* 10 (1943)

Shortly thereafter the Chairman (Rep. Andrew J. May, Kentucky) pointed out:

I think the preservation of conscience is a very important thing, and freedom of conscience is a very important thing. That is one foundation upon which our structure of government is built. . . . (*Id.* at 10).

This protection sought for religious liberty and conscience applies no less forcefully to those whose scruples

dictate that they abstain from the present war, than it does to those opposed to all wars. The discriminating religious objector follows a tradition recognized by Christians for more than 1;500 years, when he undertakes to assess whether a conflict is a "just war." St. Augustine, *City of God,* Book XIX, ch. 7 (Image Books ed., 1958); *Deliverance on Rights and Responsibilities of Public Dissent, Social Deliverances of the 178th General Assembly of the United Presbyterian Church U. S. A.,* Social Progress, July-August, 1966, 26-30, especially 28; see also, R. Bainton, *Christian Attitudes Toward War and Peace,* (1960) *passim,* (tracing the concept of the just war back to the Old Testament, and classical and early Christian thinking which influenced St. Augustine); Finn, *A Conflict of Loyalties,* (1968) *passim;* see generally, Hochstadt, *The Right to Exemption from Military Service of a Conscientious Objector to a Particular War,* 3 Harv. Civil Rights-Civil Liberties L.Rev. 1, 10-15 (1967).

(2) Preventing disruption of the armed forces

The second reason for the exemption has been that the induction or retention of objectors in the services would cause intolerable disruption. During the House Military Affairs Committee hearings, Congressman Faddis emphasized this as the other purpose underlying the exemption:

> And, secondly, I am sure if I were to go out and command the troops—and I may—I don't want any conscientious objectors in my regiment at all. I would rather they would be some place else. They would be more bother than they would be worth, and a bad example to other men. You could not do anything with them in the way of soldiers and somebody would have to be doing the fighting in a war and I am sure no

man who would command the troops would want them. National Service Board of Religious Objectors, *Congress Looks at the Conscientious Objector* 12 (1943).

Yet this is the case as much for discriminating objectors as for universal pacifists. There is no reason to assume that discriminating objectors will be any more amenable to compulsion or any less influential upon the morale of other men than universal pacifists.

Thus, neither of the two legislative purposes in establishing the exemption justifies a distinction between the universal pacifist and the discriminating religious objector to war; indeed, recognizing the selective conscientious claim is consistent with those purposes.

C. Recognizing a Selective Conscientious Objector's Exemption From Combat Duty in the Vietnam War Does Not (1) Raise a Political Question; (2) Impugn the Integrity of the Democratic Process or Justify Civil Disobedience; or (3) Interfere With Military Efficiency

1. *No political question unfit for judicial resolution is involved*

The Government seeks to transform this well-established due process and First Amendment balancing into something quite different. The Government would have this Court believe that the district court was passing on whether "a particular law or particular foreign policy is good or bad, or whether there is of is not any need for specified numbers of men in a particular place at a certain time." Brief 40. Citing a string of decisions indicating the limits of judicial power in the area of foreign affairs, the Brief characterizes the court below as seeking to pass on

"whether the United States does or does not need to take into the Armed Forces men who do not agree with its foreign policy of the moment." Brief 41.

This description grossly distorts the opinion below. Judge Wyzanski was deciding not whether we need 300,000 or 400,000 combat troops in Vietnam, or whether the March, 1969 quota required drafting dissenters, but a much narrower question, which is quite appropriate for judicial consideration: whether a right of conscience and ultimately to life itself can be overridden when there is no showing or even claim of any need therefor. In determining need, the district court did not have to examine complex data or make political judgments but relied on two facts only: the lack of either a declaration of war or of a threat to the homeland, both of which facts are totally undisputed and indeed a matter of public record. This is precisely the kind of balancing this Court has consistently undertaken where constitutional rights are concerned, see, *e.g.*, the clear and present danger test of *Dennis* v. *United States*, 341 U.S. 494 (1951); and *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969), and the aforementioned balancing tests of *Barenblatt* and of *Sherbert* v. *Verner*. Indeed, the Government itself has heretofore supported such an approach in the speech area. The district court had to do less of a factual analysis of needs and threats than has been done in the aforementioned situations, for Judge Wyzanski relies solely on the two undisputed facts noted.

Invoking the talismanic label "political question" does not decide this issue either. In *Baker* v. *Carr*, 369 U.S. 186, 217 (1962), this Court declared that it would find a "political question" when there exists

> ". . . a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question."

Under these criteria, the balancing issue herein is quite justiciable: there is no textually demonstrable commitment of this issue to the other branches; there are well-established judicial approaches for resolving the question in *Barenblatt, Dennis, Brandenburg,* and *Sherbert, supra;* there is no danger of multiple and conflicting governmental pronouncements; no extended weighing of political or economic factors is involved nor is there a need for access to a mass of secret or technical data; there is no head-on collision with purely administrative or executive decision, and there is no unusual need for adherence to a political decision.

This conclusion is further supported by a consideration of the issues involved in the authorities cited by the Government, which are treated in the margin.[9]

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[9] *Pauling* v. *McNamara,* 331 F.2d 796, 799 (D.C. Cir. 1963), *cert. denied,* 84 S. Ct. 1336 (1964), involved an attempt to have the courts enjoin nuclear testing; *Ludecke* v. *Watkins,* 335 U.S. 160 (1948), involved review of an existing Executive determination of when a war was ending.

Courts have both the competence and the duty to determine whether the most fundamental rights of liberty and life can be overridden where no showing of need therefor is made or even attempted. The executive and legislative branches have not been freed from the obligation to act responsibly when they invade the highest of human interests—life and conscience. In short, the Congressional power to raise armies is not exempt from the Constitution.

2. *The democratic process is not impugned by allowing selective conscientious objection nor is civil disobedience legalized*

The Government argues, however, that allowing selective objection impugns the democratic process because it justifies an exemption from civic obligation on the grounds of political dissent; further, that such an exemption allows exemption from all other obligations and in effect permits civil disobedience.

Such fears are unwarranted. In the first place, this decision deals explicitly only with *combat* duty. Surely, the difference in magnitude between compulsory killing under penalty of death, and other forms of service, is sufficiently great that a special exemption for the former implies nothing as to the latter or to civil disobedience in general. We do not deal either with volunteered obstruction or compulsory tax payments or even compulsory open housing. Rather, we deal with a conscientious objection to having to kill or be killed, a case so obviously special—as is everything involving death—that it serves as a weak precedent indeed for other forms of dissent. When the government "orders citizens to kill or die, it comes close to the limits

that even Hobbes put down around the authority of the Leviathan." Christian Bay, quoted in Kaufman, "The Selective Service System: Actualities and Alternatives" in Finn (ed.), *A Conflict of Loyalties*, 240, 252 (1968).

In support of its contention that recognition of selective conscientious objection should be rejected because of the "traditional application of the 'political question' doctrine," Brief, page 49, the Government cites the policy reasons given by a majority of the Marshall Commission in its 1967 report, National Advisory Commission on Selective Service, *In Pursuit of Equity: Who Serves When Not All Serve?*, pp. 48-51. It is interesting to note, however, that the Government does not cite a single other commentator or writer who supports this position. The fact is, that the overwhelming majority of distinguished writers, scholars and theologians who have considered the subject have strongly endorsed the wisdom of and advocated recognition of selective conscientious objection, and have vigorously criticized the reasoning and conclusions of the Marshall Commission majority. This is true of most of the contributors to the most recent book which has been published on this subject, Finn (ed.), *A Conflict of Loyalties* (1968). See particularly the essays by the late Father John Courtney Murray, one of the Marshall Commission minority; see, also, Quade, "Selective Conscientious Objection and Political Obligation," Finn, *supra*, at 195, 205-211; Harrington, "Politics, Morality and Selective Dissent," Finn, *supra*, at 219, 224-226; and Kaufman, "The Selective Service System: Actualities and Alternatives," Finn, *supra*, at 240, 244-254. Professor Kaufman concludes: "Many parts of the Commission's report are excellent; most of the reasoning is sound. But in their discussion of selective conscientious

objection, the Commission's majority seemed to become tools of higher political powers." *Id.*, at 254.

To put it another way, the opinion of the court below did not permit the selective conscientious objector completely to avoid supporting his community's policy; it allowed him only an exemption from supporting it in a particular way—by killing. Thus the court stressed that it was not ruling on the requirement of wartime or peacetime conscription, or even of conscription in the military, but only with the obligation to kill on pain of being killed. The court's ruling does involve some dispensation from total acquiescence in a political decision, and does recognize a citizen's right to interpose his moral judgment upon the state's political decisions, in a very narrow but crucial area. But surely a great nation, confident of its power and its cause, can tolerate something less than total acquiescence when there is no demonstrable harm to efficiency or to any other substantial interest and especially when that small dispensation is in the name of conscience. Great Britain managed it quite easily in its darkest hour, see *infra*, p. 34, and a nation conceived in liberty and conscience can do just as well in a conflict which in no way jeopardizes its security.

It is for this reason that the Government's citation, at page 45 of its brief, to Mr. Justice Cardozo's concurrence in *Hamilton* v. *Regents*, 293 U.S. 245, 268 (1934) is misleading. Of course, "extension of the conscientious objector's liberty *might* lead to wholly incongruous situations" (emphasis added). It all depends, however, on the nature and magnitude of the extension. In *Hamilton*, a group of religious students unsuccessfully sought exemption on con-

scientious grounds from compulsory participation in a college ROTC program. Focusing on the very marginal involvement with the military that such courses entailed, Mr. Justice Cardozo first stressed that

> The petitioners have not been required to bear arms for any hostile purpose, offensive or defensive, either now or in the future. They have not even been required in any absolute or peremptory way to join in courses of instruction that will fit them to bear arms. (293 U.S. at 265-66.)

It was only on *this* background and claim, totally unlike Sisson's who *is* being subject to bearing arms, that Justice Cardozo then concluded by warning against the dangers [i]f his [the conscientious objector's] liberties were to be *thus* extended . . ." 293 U.S. at 268. (Emphasis added.)

This case is unique in another way: it involves combat in an undeclared war where the democratic process has not in fact followed its usual course before constitutionally committing men to kill. The importance of a declaration was noted in the *Selective Draft Law Cases*, 245 U.S. 366, 389-90 (1918), when the Court rejected the claim of involuntary servitude where defense of the nation was required "in a war declared by the great representative body of the people."

Finally, the fact that Sisson's conscience involved the "political" is no reason to deny it sanction. The most religiously sensitive conscience will make so-called "political" judgments, when it passes on political affairs. See, *e.g.*, the works of Martin Buber, Reinhold Niebuhr, Paul Tillich, the Gospels and the Talmud. Unless conscience is to ab-

dicate its responsibilities where public matters are concerned—a position espoused by no religious or other ethic —"political" judgments are necessarily involved. Indeed, does not the total pacifist's objection to participating in any military service necessarily entail "political" decision-making about the nature of war since total pacifism is consistent with personal self-defense? This does not mean that all political questions are moral or vice versa, but unless the words "political" or "moral" are to lose all independent meaning, unless the words "power" and "conscience" have lost all independent significance, moral decisions are different from political decisions and it is only the former which demand recognition.

Obviously, amici are not urging that there is a constitutional right to be exempt from military service in a particular war for one whose objection to that war is based on the fact that it is opposed by his political party; or whose objection is based on his view that it will improve foreign trade with a neutral power; or whose objection is posited on a favoring of certain political or economic or cultural conditions in the country with which we are at war over our own. These are clearly political objections. On the other hand, when Dr. Reinhold Niebuhr and his colleagues at Union Theological Seminary, who joined with him in founding "Christianity and Crisis" at the outbreak of World War II, departed from the traditional pacifism of American Protestantism, and concluded that World War II was a just war, this was surely a combined political and religious judgment. The same is true for the late Fr. John Courtney Murray, a vigorous advocate of selective conscientious objection, who, until his death, supported the Vietnam War. See Murray, "War and Conscience" in Finn

(ed.), *A Conflict of Loyalties*, 19-30 (1968). ("I can just about make the moral case. But so it always is. The morality of war can never be more than marginal . . . . Moral judgment on the issue must be reached by a balance of many factors." *Id.* at 23.) And it is conversely and equally true for the men of conscience, including theologians and selective service registrants, who have come to a combined religious and political judgment that they are selective objectors to the present war.

The proper question is whether, as Judge Wyzanski put it, the *source* of the decision "is moral and ethical . . . reflect[ing] quite as real, persuasive, durable and commendable a marshalling of priorities as a formal religion." App. 22. Indeed, except for Sisson's own perhaps uninformed and ill advised conclusion that his objection was "not religious," cf. *United States* v. *Schacter*, 293 F. Supp. 1057 (D. Md. 1968) (holding professed atheist entitled to conscientious objector status) his and similar moral views would easily fit within the *Seeger* definition of religion: "a belief [which] occup[ies] the same place in the life of the objector as an orthodox belief in God holds in the life of one clearly qualified for exemption." 380 U.S. at 184. Compare Seeger's own statement of his views, described and discussed in the Court of Appeals' opinion in *Seeger*, 326 F.2d 846, 848 (2d Cir. 1964).

3. *Allowing selective conscientious objection will not destroy morale or impair efficiency*

It is argued, with more fervor than facts, that allowing selective conscientious objection is unfair, and destructive of both morale and efficiency. Since the prevailing inter-

pretation of the statute has thus far not permitted recognition of selective conscientious objection—assuming that all who have qualified for exemption under §6(j) are "total" objectors—there is little evidence to go on. Because the supreme values of conscience, life and liberty are concerned, a very heavy burden lies on those who seek to infringe such rights, and in the absence of evidence, they should not prevail.

Furthermore, the available evidence contradicts such a claim. Great Britain, during World War II, permitted selective conscientious objection on grounds of conscience alone, without a religious test. See Hayes, *The Challenge of Conscience* (1947). A negligible number sought, and even fewer gained, exemption. See MacGill, 54 Va. L.Rev. at 1381 n. 101; Note, 34 U. Chi. L.Rev. 79, 89, 103-04 (1966). This is probably because the way of the conscientious objector, and particularly of the selective conscientious objector, is hard indeed,[10] see Sibley & Jacob, 315-19, 459-64. Understandably, few seek it, especially in a nation which does not cheerfully tolerate active dissent in times of international crisis. "This is borne out by the experience of the American Civil Liberties Union that notwithstanding its stated readiness to accept selective conscientious objector cases for almost three years, only a handful of men have come forward." Book Review, New York Times, Nov. 2, 1969, pp. 10, 12. The *Seeger* case itself resulted in relatively few additional exemptions, though that may have been because of the hostility thereto of local boards, a hos-

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[10] e. e. cummings' poem "i sing of olaf strong and brave" is a particularly vivid rendering of the treatment once—and perhaps still—afforded conscientious objectors.

tility, however, which will not be appreciably less for selective objectors. See MacGill, 54 Va. L.Rev. at 1380, n. 78. And under the opinion below, alternate service remains so that no unfair increase in comfort for the objector is involved.

There is also no indication that there are unusually severe administrative problems. See MacGill, 54 Va. L. Rev. at 1380-81; Note, 34 U. Chi. L.Rev. at 104-05. And it is equally difficult to believe there will be any impairment of morale if a few conscientious objectors have to perform duties which many civilians and even soldiers perform anyway.

Practical considerations actually cut *for* the exemption not against. No conscientious objector, whether selective or total, is likely to make a good soldier. Since alternate service is required under the opinion below, it seems a flagrant waste of highly trained and scarce resources to force someone who will perform such alternate service, not infrequently a person of high intellectual and moral caliber, to go to jail in order not to violate his conscience. Cf. *United States* v. *Macintosh*, 283 U.S. at 629. It seems especially wasteful since it is clear that in this area compulsion simply does not work—it merely puts a substantial number of people behind bars and fails either to deter or to make use of the true conscientious objector. Sibley & Jacob, 475-78.

In contrast to the purely speculative nature of the harm in allowing the claim of conscience, the great harm to both the individual and to the community if the conscience is ignored is plain. We live today in a world where man's destructive skills have far outdistanced his meager peace-

making wisdom, where frustration, cruelty, and arrogant power often drown out the still small voice of conscience. In such a world, we should not readily override a sincerely conscientious objection to killing. As the poet Karl Shapiro has reminded us in his poem "The Conscientious Objector,"

". . . Your conscience
Is what we come back to in the armistice."

II.

CONGRESS CANNOT CONSTITUTIONALLY GRANT EXEMPTION TO THE RELIGIOUS CONSCIENCE AND DENY IT TO THE NON-RELIGIOUS.

The Government contends that the issue of nonreligious objection is not in this case, although it relies on the nonreligious nature of Sisson's claim to deny any arbitrary discrimination. See Government Brief 45-46. Its argument is that because Sisson's objection is selective, he is ineligible anyway. Yet, if the selectivity is not a disqualification, as Judge Wyzanski concluded, then it would seem necessary to consider the other possible ground of disqualification—the nonreligious character of Sisson's objection. On this issue, amici urge:

(1) The statutory definition unconstitutionally favors religiously conscientious objectors over nonreligious objectors, and therefore constitutes an unconstitutional establishment of religion.

(2) The statutory standard "by reason of religious training and belief" operating in a nation that has several

hundred denominational concepts of the meaning of religion, and uncounted non-denominational ones, has proven to be so vague as to be unworkable, confusing and subject to arbitrary application and it inevitably produces unfair discrimination among registrants.[11]

1. It Is an Unconstitutional Establishment of Religion to Discriminate Against Non-Believers

Constitutional neutrality with respect to believers and non-believers requires that no special rights be given to the believers, regardless of whether such benefits be constitutionally required or legislatively granted. *Torcaso* v. *Watkins*, 367 U.S. 488 (1961). Cf. *Sherbert* v. *Verner*, 374 U.S. 398, 404 (1963); *Everson* v. *Board of Education*, 330 U.S. 1, 15-16 (1947).

Relying on this constitutional principle Judge Wyzanski briefly observed what would seem self evident:

> . . . [I]t is difficult to imagine any ground for a statutory distinction except religious prejudice. In short, in the draft act Congress unconstitutionally discriminated against atheists, agnostics, and men, like Sisson, who, whether they be religious or not, are motivated in their objection to the draft by profound moral beliefs which constitute the central convictions of their beings. App. 35.

It is indeed difficult to see a basis for such a distinction. As Edward L. Ericson, President of the American Ethical Union, has said:

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[11] Parenthetically, we would note that Sisson's views may actually fit the *Seeger* definition of religion, but since he apparently did not urge this, amici do not either.

> "The notion that the conscience of the 'orthodox' believer in God is grounded upon a firmer and more compelling imperative than the conscience of the humanist or the freethinker is itself a theological judgment that a secular constitutional democracy such as the United States has no right to make. A state that makes such distinctions is already doing theology and therefore clearly transgressing the nonestablishment clause of the first amendment. Whether religionists have better or more impelling consciences than those who make no claim to be religious is an issue that philosophers and theologians—and plain people—should be free to debate, but on which it is unconscionable for the state to legislate. For to do so is for government to obstruct the open encounter of conflicting opinion that Milton and Jefferson saw as the necessary condition of liberty and moral progress." Ericson, "Humanist Conscientious Objection" *Humanist* (May/June 1969).

Nor is there any particular administrative difficulty involved. As Judge Wyzanski observed "[t]he suggestion that courts cannot tell a sincere from an insincere conscientious objector underestimates what the judicial process performs every day," App. 31, and this applies to local boards as well. Courts and boards have consistently ruled on the sincerity of religious objectors and they can do the same with the non-religious as well. After all, the religiosity of the conviction does not control its sincerity. Indeed, in a skeptical age, those who question established and other religions and beliefs are often among the most sincere. Cf., *United States* v. *Kauten,* 133 F.2d 703, 708 (2d Cir. 1943).

2. The Inherent Imprecision of the Statutory Standard Raises Difficulties of Constitutional Dimension

If not always true, certainly in an age of skepticism and of changing and expanding concepts of the meaning of religion, a statutory standard that requires a showing of "religious training and belief" necessarily invites varying and inequitable interpretations. The 1948 Act's attempt to add precision, by a definition that required "belief in a relation to a Supreme Being involving duties superior to those arising from any human relation," created constitutional difficulties of another dimension. *United States* v. *Seeger*, 326 F.2d 846 (2d Cir. 1964), *aff'd*, 380 U.S. 163 (1965). While this Court's construction of that definitional language in *Seeger* sought to obviate those constitutional difficulties, the inherent imprecision remained.[12]

The Marshall Commission and others have found that a great many boards totally ignored the *Seeger* interpretation while many others grossly and wrongly narrowed it. For a summary of such findings see MacGill, 54 Va. L. Rev. at 1380-81; a very recent law review note found that courts had similarly misapplied it, though not nearly with so much hostility. See Note, Religious and Conscientious Objection, 21 Stan. L. Rev. 1734 (1969). There is thus a significant constitutional question whether Congress can enact a law which grants such vast administrative discretion to lay, nonexpert bodies like local boards, with so little meaningful guidance that the results are inevitably inequitable and discriminatory. See, *Keyishian* v. *Board of Regents*, 385

[12] Indeed, the lack of evenhandedness of the application of this and other sections of the draft law has been a greater impediment to national morale, than granting an exemption for selective objectors is ever likely to be.

U.S. 589 (1967); *Baggett* v. *Bullitt*, 377 U.S. 360 (1964); *Cramp* v. *Board of Public Instruction*, 368 U.S. 278 (1961).

The interests at stake are so weighty, the problems of defining religion for these purposes are so great, and the actual administration of the standard so poor, that both constitutional imperatives and sound policy call for its abandonment. Since, as noted above, there is a constitutional right to a conscientious objection, this Court should abandon the requirement of a religious source and allow all conscientious objectors freedom from having to kill against the dictates of their conscience.

CONCLUSION

For all these reasons, the decision below should be affirmed.

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APPENDIX

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Excerpts from pp. 12-15 of the petition for certiorari in *Noyd* v. *McNamara,* O.T. 1967 No. 722 (certiorari denied, 389 U.S. 1022):

Three "distinguished theologians and philosophers," 267 F. Supp. at 705, App. 11a, were qualified as expert witnesses and testified on behalf of petitioner. They were:

Dr. Paul Kurtz, Professor of Philosophy at the State University of New York at Buffalo, Chairman of the editorial board of *The Humanist* (the periodical publication of American Humanist Association), author of *Decision and the Condition of Man* (University of Washington Press, 1965), and several other books, and editor of *Humanist Ethics* (a collection of essays by leading theologians and philosophers being published by Prentice Hall this year).

Dr. Robert C. Kimball, Professor of Theology at the Starr King School for the Ministry at Berkeley, California, Unitarian and Congregational Minister, formerly lecturer at Harvard Divinity School, editor of *Theology of Culture* (Oxford University Press, New York 1959), and Literary Executor of the Estate of Paul Tillich.

Dr. Robert McAfee Brown, Professor of Religion at Stanford University, formerly Professor of Religion at Union Theological Seminary, author of *The Spirit of Protestanism* (Oxford University Press 1961) and (with Gustave Weigal, S.J.) *An American Dialogue* (Doubleday), and other books, member of the editorial

boards of *Christianity and Crisis* and *The Journal of Ecumenical Studies,* holder of honorary doctorates from Notre Dame, Boston University, Loyola, University of San Francisco, Amherst and Lewis and Clark University, and official observer for the World Alliance of Reformed and Presbyterian Churches to the Second Vatican Council.

Each expert witness testified, with respect to the facts of this case, from personal familiarity with the petitioner's applications and from personal interviews with Captain Noyd which were arranged for the purpose of the expert being called a witness in this case.

Dr. Kurtz testified that Religious Humanism is rooted in the deepest traditions of the West, in the humanism prevalent in the Christian religion, and in such other major religions as Buddhism and Confucianism (R. 494). Petitioner's applications, he testified, and the background and beliefs expressed in his total position, identify him as a genuine participant in this religious tradition (R. 597).

Dr. Kimball described the meaning of religion, as it is captured in Tillich's dictum that that which is a man's ultimate concern is God for him (R. 508). The evidence that petitioner's conscientious objections are religious, he stated, are to be found both in his sincerity and in his courage, the two being central to the Tillichian concept (*vide,* Tillich, *The Courage to Be*) (R. 512).

Dr. Brown testified that what is or is not religious might properly be tested in terms of the root of the word "religion" (Latin: *religare,* to bind fast) from which it may be defined as "that to which one binds himself" (R. 526).

Religion is found, not just in what one says—in rituals and creeds—but in the degree of congruence between expressed statements of belief and what one does with his life. Dr. Brown found a commitment authenticating his words in petitioner's life and deeds which led him to conclude that his position is clearly based on religious training and belief (R. 527, 546).

On the subject of the religious man's participation in war, Dr. Brown identified several separate strains or traditions of religious thought within Western religions (R. 543 et seq.). He pointed out that these traditions sometimes cut across denominational or sectarian lines; for instance, the Jehovah's Witnesses partake of both the "pacifist" and the "crusade" traditions which are, in a sense, the opposite extremes of the total spectrum of views presented by these peace-war traditions (R. 545).

Dr. Brown emphasized the number of modern religious leaders and denominational bodies which had expressed themselves on the import of religious teachings for the religious man's participation in war. He pointed out, for instance, that the most recent pronouncements of Pope Paul VI approach the verge of describing the very war to which petitioner objects in conscience as an unjust war, and he described the commitment of the Catholic Church and of several American Protestant denominations to support the conscience of those who find that they cannot participate in war or in a particular war (R. 536 to 537, 539 to 542).

All three expert witnesses testified that the differences between universal pacifism and discriminating pacifism, religiously, is confined to the content of their religious beliefs. It does not extend to their religious quality. Both

are equally religious, in every sense of the word; neither is more "political" than the other. Neither can be said to belong to a more ancient or venerable religious tradition than the other. Dr. Kimball pointed out that both the universal pacifist and the discriminating objector have general principles which each must apply discriminately, in particular circumstances. (The universal pacifist, for instance, must discriminate among various of his individual actions, such as paying taxes, in terms of whether they amount to participation in war. R. 517.) Dr. Brown stated that, if the law were to exempt universal pacifists while denying exemption to discriminating ones, it would discriminate religiously—by *content* of belief—against some religious views and in favor of others (R. 542 to 543).